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NOS. 23, 24 AND 25, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A," CASE "B" AND CASE "C."

SUPPLEMENTAL BRIEF.

MR. CLERK:

Please file.

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POINTS TO BE DISCUSSED.

I. AN OFFICER, WITHIN THE PROVISIONS OF SECTION 33 OF THE JUDICIAL CODE, MUST SHOW, AS A CONDITION PRECEDENT TO HIS RIGHT TO REMOVE THEREUNDER, THAT THE ACTION OR PROSECUTION AGAINST HIM AROSE OUT OF SOME OFFICIAL ACT.

II. THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS NOT AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, BUT, ON THE CONTRARY, WAS A WRONGFUL ASSUMPTION OF JURISDICTION FOR WHICH THE ONLY REMEDY IS MANDAMUS.

I.

AN OFFICER, WITHIN THE PROVISIONS OF SECTION 33 OF THE JUDICIAL CODE, MUST SHOW, AS A CONDITION PRECEDENT TO HIS RIGHT TO REMOVE THEREUNDER, THAT THE ACTION OR PROSECUTION AGAINST HIM AROSE OUT OF SOME OFFICIAL ACT.

The historical basis of *Section 33 of the Judicial Code*, was the attempt of the States, *by statutory enactment*, to nullify the acts of Congress, by making criminal, acts which Congress authorized and directed Federal revenue officers to perform. Yet, it is also true, as contended by the respondents, that the Courts have given the statute a much broader construction so as to include within its scope all official acts, whether within a State *statutory* prohibition or not. The effect of this has been to accord to these Federal officers the right to have actions and prosecutions against them tried in the Federal Courts, whenever such actions or prosecutions have arisen out of the exercise by them of some prerogative within the scope of their official duties. Beyond this, it cannot be contended that the Removal Statute, either in its letter or spirit, was intended to establish the Federal Courts as a special forum for Federal officers, irrespective of the manner in which the actions or prosecutions against them may have arisen. For if this was the intention of Congress, the privilege of removal would not have been circumscribed so definitely and particularly. Congress undoubtedly intended to limit and restrict the privilege to suits or prosecutions "on account of any act done under color of his office or of such law"; otherwise there would have been no necessity for the use of this restrictive and modifying language.

The Removal Act was the result of an open defiance by the States, as such, of the exercise of Federal authority. It did not contemplate and was not directed against

fraudulent and nefarious concoctions upon the part of individuals who were not in sympathy with the Federal law.

It might be assumed from the contentions made by the respondents in this case that the sole purpose of the law was to protect Federal officers from civil actions or criminal indictments for something which the officers never did, that is to say, from concocted or "trumped up" actions and prosecutions. There is nothing in the legislative history of the law to indicate that it was such an evil against which the law was directed. Congress had the alternative of excluding such cases altogether or extending the right of removal to Federal officers in all civil actions or criminal prosecutions brought against them, without restriction. Exclusion was the only practicable and sensible solution, for if the hostility against the law was so great that actions and prosecutions were deliberately concocted for the purpose of jailing and harrassing the Federal officers, such cases could be based as readily on acts alleged to have been performed by them after working hours, while they were in their homes, or engaged in their own personal pleasure or business, as well as upon acts alleged to have been committed by them in the course of their official duties.

Fortunately, such concoctions are rare. Congress left it to the decency and honesty of the administration of justice in the State Courts to expose them. *Open defiance* of the Federal law was grounded at least in an honest and fearless disagreement with Federal policy. This, Congress had a perfect right to attempt to counteract. But it is not to be assumed that the States themselves were, or are, so devoid of honor as to prostitute their judicial tribunals by scheming artifice in order to hinder the enforcement of unpopular Federal laws, or that their

Courts are so impotent and their judicial system so defective, that honest defense will not prevail over fraudulent contrivance.

We submit that where, as in the case at bar, the officer denies all knowledge of the act which is the foundation of the civil action or criminal prosecution, necessarily, the right of removal does not exist, because, in such a case, there is an absence of an official act which is the basis of the statutory right. A few examples will demonstrate the utter unsoundness of such an application of the language of the statute. In the case at bar the only justification for the removal is the fact that the prohibition agents were returning from an investigation, made in the performance of their duties, to report the results of the investigation to their superior officer. We maintain that this does not constitute an act done under color of office within the meaning of the law, because the mere fact of returning from an investigation to report the results thereof to a superior officer is not an official act which resulted in the prosecution.

Suppose, for instance, a revenue officer, detailed to make an investigation of a violation of the revenue laws, motored, with his wife, to the scene of the investigation, and after completing his work, while on his way to report to his superior officer, he suddenly took a notion to beat his wife. Certainly it could not be contended that a criminal prosecution arising out of such an act could be removed as an act done under color of his office, although in that case, just as much as in the instant case, the alleged crime occurred while the officer was returning from an investigation to report to his superior.

Again, if upon the return of an officer from an investigation, to report to his superior, he was walking along Pennsylvania Avenue on his way to the Treasury De-

partment and engaged in a street brawl or riot, a prosecution arising therefrom would not be removable.

And again, if an officer, on his return from an investigation to report to a superior officer, borrowed an hundred dollars, and thereafter failed to repay the money, and was sued civilly therefor, he could not contend that such an act was done under color of his office, so as to entitle him to remove the action.

We submit that it is clear from these examples, that the mere act of returning from the scene of duty to report to a superior officer is not sufficient to justify the removal of every action or prosecution arising out of every act alleged to have been committed during such time.

The officer must show that the prosecution or action would not have arisen except for the performance of an act which it was incumbent upon him to perform in the course of his duties.

It is argued that if he were compelled to set up such an act as a condition of removal, this would be a violation of the privilege against self-incrimination. But this presupposes, first, that the application for the removal of the cause is mandatory upon the officer, that is to say, that he is compelled under the law to seek a removal of the case against him; and, secondly, that the setting up of an official act which gave rise to the action or prosecution, necessarily involves the admission of a crime. This latter contention obviously fails to take into account the distinction between the denial of an act and the denial of the criminality of such act as pointed out in the Court's opinion in *Alabama v. Peak*, 252 Fed. 306. Is there any self-incrimination in the position taken by the officer in the case of *Tennessee v. Davis*, 100 U. S. 257, where the officer admitted that he killed, but claimed that it was neces-

sary for him to do so in his own self-defense, while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States? Or, in the case of an officer, charged with larceny, who admits taking the goods but claims that it was necessary to have them as evidence in a prosecution against the person in whose possession they were found?

The respondents lay great stress upon the use of the word "color" in the statute, and contend, in effect, that inasmuch as acts done "under color of office" may very well prove insufficient to establish a complete justification, and the phrase "color of office" covers a claim which may later turn out to be groundless as well as a claim, which further investigation shows to have been well founded, that Congress intended to accord the right of removal to every officer, who, in his petition for removal used the broad, general, magic words "act done under color of office," regardless of the incongruity between such allegation and the actual facts of the case, as detailed in the petition. A fair analysis of the cases upon this point gives no color to such a contention. When Congress adopted the term "under color of office," it undoubtedly intended to permit the removal, upon the statement of the officer of facts, which show that the action or prosecution arose out of an official act, even though such statement proves thereafter to be totally unfounded.

In our Case "A" brief (pp. 26-28), we point out the distinction between the requirements of the removal statute and the provisions of *Section 753 of the Revised Statutes*, authorizing the Federal Courts to release by habeas corpus, persons "in custody for an act done or omitted in pursuance of a law of the United States."

Under the latter statute, it must not only be *alleged* that the act done was within the scope of the officer's authority, but that fact must be affirmatively established, before the Court can act. Under the removal statute, it is not necessary to establish that the act done was within the actual scope of the officer's authority, so long as it is alleged or claimed that such is the case, and a state of facts is presented to the Court by the petitioner which justifies such a claim.

"Color of office" merely means that the petitioner must establish *prima facie* that the act done was within the scope of his official duties, and not establish this as a matter of fact, as is required under *Section* 753 *of the Revised Statutes.*

In other words, under *Section* 753, an officer must *show* he had the authority, and the act for which he is held grew out of the exercise of such authority. Under the Removal Act, it is merely necessary that he *allege* he was acting within the scope of his authority and set forth facts sufficient to establish this *prima facie.*

The respondents have not cited a single authority which is at variance with this statement of the law.

"Color of office," as used in the act is an honest belief in a state of facts, which, if it exists would be a legal justification or excuse; such semblance or appearance of right as shows that the right is really in dispute. It is the presumption of authority sustaining the acts of the officer, which is derived from his apparent title to the office or from a writ or other process in his hands apparently valid and regular.

"Color of office," as used in the Removal Statute, certainly does not imply bad faith, corruption or breach of

duty, qualities which are ascribed to the term under some of the authorities, cited in the respondents' supporting briefs, such as *Bouvier L. D. s. v. Color of Office* and *Griffiths v. Hardenbergh*, 41 N. Y., 464, where it was defined as "an act wrongfully done by an officer under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color." For, when we consider that the statute was intended to accord its privileges to officers in the discharge of their duties and to prevent embarrassment to the Government in the collection of its revenues, it is obvious that the term "color of office" cannot be given an evil significance. It may be assumed that the Federal Government was not zealous of conferring special privileges upon its officers *who exceed their authority*. The purpose was to insure those in the Government service of a fair, impartial trial and an acquittal where they have acted *in pursuance of the power and authority vested in them*.

II.

THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS NOT AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, BUT, ON THE CONTRARY, WAS A WRONGFUL ASSUMPTION OF JURISDICTION, FOR WHICH THE ONLY REMEDY IS MANDAMUS.

In our brief in Case "A," we point out with some particularity the rules which have been laid down for the issuance by this Court of the writ of mandamus to compel an inferior Federal Court to remand a case pending therein to the State Courts. These rules may be summarized as follows:

1. The remedy of mandamus cannot be resorted to in a *civil proceeding*, because

(a) Mandamus cannot be used to compel an inferior Court to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, and

(b) The writ cannot be used to perform the office of an appeal or writ of error.

2. In *criminal proceedings*, where a case has been unlawfully removed by an inferior Federal tribunal, this Court, upon the application of the State, can compel the remand of the prosecution to the State Courts, because

(a) *Section* 688 *of the Revised Statutes* specifically empowers this Court to issue writs of mandamus, in cases warranted by the principles and usages of law to inferior Federal tribunals, *where a State is a party;* and

(b) No power otherwise exists to correct the wrongful assumption of jurisdiction by the inferior Federal Court, for an appeal from an order of a District Court refusing to remand a case to a State Court, can be had only after final judgment, and if the final judgment is one of acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment.

These principles are not seriously controverted in the respondents' briefs, and no *criminal* case is cited or referred to where mandamus was denied.

It is strenuously urged, however, that inasmuch as the petition of the accused officers for removal was duly verified under oath and was signed by all five of the petitioners, and inasmuch as the motion to remand interposed by the State of Maryland, directly traversed the allegations in the petition for removal, that a controverted issue of fact, or of mixed law and fact, was presented to the

Court for its determination, and that where the facts stated in a petition for removal are put in issue, the decision of the District Court upon that issue, cannot be reviewed by mandamus.

But we respectfully submit that there was no issue of fact before the District Court. It is true that the facts as stated in the petition for removal were traversed in the motion to quash and remand filed on behalf of the State, but it is likewise true that even if there had been no traverse it could have been assumed that the State of Maryland was not in accord with a statement of the facts, which showed the petitioners were innocent of the crime for which the State had indicted them.

Certainly, even without a traverse, it must be taken for granted that the District Court could not assume that the allegations in the petition were admitted by the State to be true.

We emphatically deny that there was any controverted issue of fact before the District Court. No testimony was taken to support such an issue, on one side or the other.

If the allegations of the petition for removal are taken to be *prima facie* true, then when their truth is challenged by the party who seeks to block the removal, the burden rests upon the petitioner to establish the truth of these allegations by testimony. There was no effort or attempt in this case, upon the part of either the petitioners or the State of Maryland to do this, and *in the arguments before the District Court, the motion to quash and remand was treated as a demurrer to the legal sufficiency of the averments of the petition.*

The authorities cited in the respondents' brief in Case "B" (page 16), although they involve civil proceedings

and are therefore not applicable to the case at bar, hold that the allegations of fact in a petition for removal are not put in issue merely by motion to remand.

> "In this Court parties wishing to raise an issue of fact affecting the jurisdiction of the Court have been permitted to do so by plea or answer, but a mere motion to remand, * * * presents only the questions of law which arise from the facts shown by the Record."
>
> *Carlisle v. Sunset Telephone Co.*, 116 Fed. 896.

See also:

Stone v. South Carolina, 117 U. S. 430-432, *and cases there cited.*

It should also be noted in this connection that the respondents assert a proposition, which if conceded, should be sufficient to require the relief to be granted in this case. They seem to admit that the jurisdiction of the District Court in this case was doubtful. If this be true, then it was the duty of the District Court to remand.

Dowd v. United Electric Co., 132 Fed. 252, 265, *and cases cited; Concord Coal v. Haley*, 76 Fed. 882; *Hutchinson v. Bugbee*, 56 Fed. 329; *Boatman's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650; *Wrightsville Hardware Co. v. Colwell*, 180 Fed. 586; *Western Telegraph Company v. Louisville & N. R. Co.*, 201 Fed. 932; *Drainage District v. Chicago, M. & St. P. R. R. Co.*, 198 Fed. 253, 264; *Eddy v. Chicago & Northwestern R. R. Co.*, 226 Fed. 120, 125; *Hauson v. Pacific Coast Asphalt Cement Co.*, 243 Fed. 283.

A State Court is not bound to surrender its jurisdiction on a petition for removal, until a case is made which on the face of the record shows the petitioner has a right to the transfer.

Stone v. S. C., 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Mays v. Newlin*, 143 Fed. 574-576; *Coker v. Monaghan Mills*, 110 Fed. 803, 806; *McAlister v. C. & O. R. R. Co.*, 85 C. C. A. 316, 157 Fed. 740, 13 A. & E. Annotated Cases 1068; *Home Insurance Company v. Morse*, 20 Wall. 445, 459, 22 L. ed. 370; *Kansas City Ft. S. & M. R. Co. vs. Daughtry*, 138 U. S. 298, 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Donovan v. Wells Fargo & Co.*, 22 L. R. A. (N. S.) 1235, 1250, 94 C. C. A. 609, 169 Fed. 364; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Johnson v. Wells Fargo & Co.*, 98 Fed. 3, 25; *Lake Street Elevated R. R. Co. v. Farmers Loan & Trust Company*, 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 769, 773.

It must be remembered that the decision of the Court below was based upon the assumption that all of the facts set forth in the petition for removal were true and the State's contentions before the District Court, and in this Court, are made upon that assumption.

In *Tennessee v. Davis*, 100 U. S. 257-261, this Court said: "But the Act of Congress authorizes the removal of any case, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the

case, and for retaining it, *at least until the claim proves unfounded.*"

It is the State's contention that the very allegations of the petition for removal show there is no basis for the assumption of Federal jurisdiction of the case, and the petitioners' own statement of the facts proves that their claim, that the acts for which they were indicted were done in the discharge of their duty as Federal officers, is unfounded. Moreover, we respectfully submit that this case can be determined by this Court regardless of what happened in the District Court, because in at least two cases in this Court, it has been held that where in a criminal prosecution, a Judge has unlawfully assumed jurisdiction of the prosecution, by removal, *no previous motion to him to remand the case is necessary.*

Virginia v. Paul, 148 U. S. 107, 122-123;
Virginia v. Rives, 100 U. S. 313, 316, 323, 324.

This Court is, therefore, authorized to treat this question *de novo*, and decide it solely upon the allegations of the petition for mandamus filed in this Court, which assumes, for the purposes of this case, all of the allegations of fact in the petition for removal to be true.

Respectfully submitted,

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